In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1139

ALAN B. CLARK, ET AL., PETITIONERS

v.

JERRY STANKIVIC

AND

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners contend that, notwithstanding their failure to file a timely written claim for a specific sum to the appropriate federal agency, pursuant to the Federal Tort Claims Act, 28 U.S.C. 2675(a) and 2401(b), they are in substantial compliance with the statutory requirements; alternatively, their failure to file an appropriate claim was excusable neglect under Rule 60(b), Fed. R. Civ. P.; and in any event this Court should grant them the relief they seek in light of pending legislation.

On August 16, 1972, petitioners Dr. Alan B. Clark and his wife Pansy Clark commenced this Federal Tort Claims Act suit in the United States District Court for the District of New Jersey, on behalf of themselves and their two minor children, seeking damages in excess of $165,000. They alleged that they were injured on August 17, 1970 when their family car was struck by a United States Army vehicle negligently driven by Army Warrant Officer Jerry Stankivic. On December 11, 1972, the district court dismissed the complaint without prejudice for petitioners' failure to comply with 28 U.S.C. 2675, which requires, *inter alia,* that a claim against the United States for money damages for injuries first be presented in writing to the appropriate federal agency.[1]

Petitioners then filed an administrative claim with the Department of the Army. The claim was denied by the Department as untimely under 28 U.S.C. 2401(b), which provides that "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues * * *." Since the claim accrued August 17, 1970, the time for filing an administrative claim had expired August 17, 1972.

On May 8, 1973, petitioners filed a second complaint in the district court, again based upon the accident which occurred on August 17, 1970, seeking $180,000 in damages. The district court dismissed this action with prejudice as barred by 28 U.S.C. 2401(b). On appeal, the court of appeals summarily affirmed (Pet. App. 1a).

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[1]Petitioners were furnished claim forms (Standard Claim Form 95) by the Department of the Army and instructed that the forms should be fully executed to state all damages claimed. However, the forms were not submitted to the Department prior to the institution of the action (Addendum to Court of Appeals Brief for the Appellees, 3a-9a).

1. Petitioners do not dispute that they failed to submit a timely written claim for a specific sum to the Department of the Army. Instead, they contend that they are in "substantial compliance" with the applicable statutes because their attorney attempted to negotiate a settlement by telephone with counsel for the government within the two-year limitations period (Pet. 7). Section 2675(a) expressly requires that a claim be made "in writing," however, and the governing regulation, 28 C.F.R. 14.2 (a),[2] requires that the claimant demand a "sum certain." Accordingly, vague oral negotiations do not constitute "substantial compliance" with the Federal Tort Claims Act. *Bialowas* v. *United States*, 443 F.2d 1047, 1049-1050 (C.A. 3). Unless a written claim for a "sum certain" is submitted to the appropriate federal agency within two years after the cause of action accrues, the requirements of Sections 2675(a) and 2401(b) are not satisfied. *Melo* v. *United States*, 505 F.2d 1026 (C.A. 8); *Avril* v. *United States*, 461 F.2d 1090 (C.A. 9); *Caton* v. *United States*, 495 F.2d 635 (C.A. 9); *Best Bearings Co.* v. *United States*, 463 F.2d 1177 (C.A. 7); *Ianni* v. *United States*, 457 F.2d 804 (C.A. 6); *Meeker* v. *United States*, 435 F.2d 1219 (C.A. 8); *Johnson* v. *United States*, 404 F.2d 22 (C.A. 5).

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[2]28 C.F.R. 14.2(a) pertinently provides:

> (a) For the purposes of the provisions of section 2672 of Title 28, United States Code, a claim shall be deemed to have been presented when a Federal agency receives from a claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident.

2. Alternatively, petitioners maintain that their attorney's failure to file an appropriate written claim for a sum certain constitutes "excusable neglect" pursuant to Rule 60(b), Fed. R. Civ. P. However, that Rule solely applies to "relief from judgment or order," not to relief from procedural prerequisites for obtaining damages from the government.

Little v. *United States*, 317 F. Supp. 8 (E.D. Pa.) and *Rabovsky* v. *United States*, 265 F. Supp. 587 (D. Conn.), upon which petitioners rely (Pet. 12-14), are inapposite, since Rule 60(b) was not invoked in these cases. Moreover, while the district courts in these cases permitted the claimants to correct timely-filed written claims to reflect more accurately the damages intended to be claimed, in the instant case the claimants failed to file any timely written claim as required by 28 U.S.C. 2675(a) and 28 U.S.C. 2401(b).

In any event, since Tort Claims Act limitations are jurisdictional, they cannot be avoided by a plea of mistake, inadvertence or clerical error. *Soriano* v. *United States*, 352 U.S. 270, 276; *Bialowas* v. *United States*, *supra*, 443 F.2d at 1049.

3. Finally, petitioners suggest that this Court disregard existing law and grant them relief because Congress is considering certain legislative proposals which would extend the time for filing personal injury actions brought by or on behalf of minors. This Court must, however, apply the law as it has been enacted by the Congress until such time as it is changed by legislative action.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.